(29,037)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 487.

EDWIN SCHWAB, PLAINTIFF IN ERROR,

vs.

FRIEND W. RICHARDSON, AS TREASURER OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

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1 In the Supreme Court of the State of California.

S. F. No. —.

EDWIN SCHWAB, Plaintiff and Appellant,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant and Respondent.

TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

Honorable Geo. A. Sturtevant, Judge.

2 In the Superior Court of the State of California in and for the City and County of San Francisco, Dept. No. 8.

No. 62256.

EDWIN SCHWAB, Plaintiff,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant.

Amended Complaint.

Comes now the plaintiff in the above entitled action, and by leave of court first had and obtained, files this, his amended complaint, against the above named defendant, and for cause of action alleges:

I.

That Oceanic Steamship Company is, and at all the times herein mentioned was, a corporation duly created, organized and existing under and by virtue of the laws of the State of California, and that the said company was created and organized for the purpose of, and at all times herein mentioned has been engaged exclusively in the business of transporting freight and passengers between the Port of San Francisco, California, the Hawaiian Islands, and certain
2 foreign countries; that the said company at no times herein mentioned has been engaged in intrastate business, save and except that said company has at all times purchased a material part of its fuel and ship supplies in the State of California, and that the said company maintains and during all the times herein mentioned has maintained offices in the City of San Francisco, California, for

the transaction of business incident to said freight and transportation business between the said City of San Francisco, California, and the said points hereinabove mentioned; that the business for which the said company is chartered is of itself commerce, and that the said company has at no time carried on a local or domestic business, except as hereinabove stated;

II.

That defendant, Friend W. Richardson, now is the duly elected, qualified and acting Treasurer of the State of California;

That John S. Chambers at all times herein mentioned was the duly elected, qualified and acting Controller of the State of California;

That John Mitchell, Richard Collins, Jeff McElvaine and John C. Corbett, and John S. Chambers now are, and ever since Jan-
4 uary 1, 1915, have been, the duly elected, qualified and acting Board of Equalization of the State of California; that at all times herein mentioned prior to January 1, 1915, Edward Rolkin, John Mitchell, Richard Collins, Jeff McElvaine and A. B. Nye constituted the duly elected, qualified and acting Board of Equalization of the State of California;

III.

That Oceanic Steamship Company has at all times herein mentioned complied with, and duly performed on its part the provisions of the laws of the State of California and conditions therein contained on its part to be performed;

IV.

That within ten days after the first Monday in March, 1914, Oceanic Steamship Company made a written report to the State Board of Equalization, duly signed and sworn to by the secretary of said company, which said report contained a concise statement and description of every franchise possessed or enjoyed by said company on said day upon which said report was executed by such company, as prescribed by said State Board of Equalization, together with a reference to the general law under which said franchises were possessed and enjoyed, and a statement of any and all conditions,
5 obligations and burdens whatever imposed upon such franchises, or any of them, and under which the same were enjoyed; said written report also contained:

(1) The name of the company, that it was a corporation organized under the laws of the State of California, the nature of its business, the location of its principal place of business in the State of California, and the names and post office addresses of its president, secretary, auditor, treasurer, superintendent and general manager;

(2) The amount of its authorized capital stock, the amount thereof issued and outstanding on the first Monday in March, 1914, and the amount paid in thereon;

(3) The funded and floating debts of the said company and the interest paid thereon on the 31st day of December last preceding the said date;

(4) The market value of the stock and of the outstanding bonds for such periods and for such dates as the said State Board of Equalization had prescribed;

(5) The assessed value of its property as assessed for the current fiscal year in each county, city and county and city in the State of California, for the purpose of taxation, and in regard to the property of said company assessed and taxed outside of the State of California, the places where such property was assessed and the amount of such assessments, and the taxes there paid during such current fiscal year;

(6) The dividends paid during the year ending the 31st day of December last preceding, the surplus fund on said 31st day of December, and between such periods as the State Board of Equalization had determined;

(7) The gross receipts from all sources for the year ending December 31, 1913, and for the entire property and business and the gross receipts from such classes of business as designated by said State Board of Equilization reported separately. The gross receipts for such period on all business beginning and ending entirely within the State of California, and that proportion of the gross receipts from all business passing through, into or out of the State of California, which the mileage within this state bears to the total mileage over which such interstate business is done, as further described in section 7 of chapter 335 of the Statutes of the State of California, approved April 1, 1911;

(8) The operating and other expenses;

(9) The balance of profit and loss between such periods as said State Board of Equalization had determined;

(10) The market and actual value of all non-assessable real and personal property owned by said company and the amount and actual value of all said real and personal property situated either within or without the State of California owned and possessed by said company at the date of its report; also the amount and actual value of all other and additional real or personal property owned by said company at the date of said report; also the gross receipts of said corporation from all sources for the year ending the 30th day of December, 1913, from the entire property and business of said company, and also the gross receipts separately stated from its California intrastate business; also the total gross receipts of said company from interstate business, separately stated; also all divi-

dends paid by said company during the years 1910, 1911, 1912 and 1913; also the disposition of the profits of said company for the year 1913; also all fixed charges of said company for the said year 1913, such as interest, rent and taxes paid, and depreciation and other similar items of such fixed charges;

V.

That under color of section 14 of article XIII of the Constitution of the State of California, and Chapter 335 of the Statutes of the State of California, approved April 1, 1911, entitled, "An act
8 to carry into effect the provisions of section 14 of article XIII of the Constitution of the State of California, as said Constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service and other corporations, banks, and insurance companies, for the benefit of the state, all relating to revenue and taxation," and as amended in 1913, said State Board of Equalization undertook to, and did, assess and levy a tax upon the exercise by Oceanic Steamship Company of the right to do the business aforesaid;

That said assessment and levy were and are wholly null and void in this: that said assessment and levy constitute an attempt to deprive said company, under guise of taxation of its property, without due process of law; that said assessment and levy were an attempt, under the guise of taxation, to deny said company the equal protection of the law, and an attempt to regulate interstate and foreign commerce;

VI.

That said assessment was and is null and void, for the reason that a large part of the property belonging to the said company now is situated, and ever since more than a year prior to the first
9 Monday in March, 1914, has been permanently situated and used, without the State of California, and during all of said times the said company has been engaged in business outside of California, and at the places where the said property is and has been situated; that said State Board of Equalization in assessing the franchise of the said company did, in pursuance of a fixed rule and general system, the result of which was necessarily discriminatory and inequitable, arrive at the value of said franchise in the following manner, to wit: the said State Board of Equalization did ascertain the actual or market value of the capital stock of said company issued and outstanding on the first Monday in March, 1914 (which said value included the value of all property of the said company situate without the State of California), and from said sum did deduct the value of all of the tangible property of the said company situate both within and without the State of California, and the total sum thus ascertained and computed was held and determined by said State Board of Equalization to constitute the total value of the franchise of said company. The said board did then ascertain and compute the percentage and proportion of the total business of said

company which was transacted and carried on by it within the State of California during the said year 1913, and did conclude
10 and determine that the same percentage and proportion of the total franchise value of said company constituted the value of said franchise assessable and taxable within and by the State of California under the said act, and the said State Board of Equalization did thereupon take fifteen (15) per cent of the sum then ascertained and held to be the value of said franchise taxable within the State of California, which said fifteen (15) per cent of said sum amounted to and aggregated the sum of one hundred and twenty thousand (120,000) dollars, and did thereupon levy a tax upon said franchise so valued, at the rate of one (1) per cent, amounting to the sum of twelve hundred (1,200) dollars; that said market value of the said shares of capital stock of the said company was at all times materially increased by reason of, and in great part due to, the ownership and use by the said company of the said property outside the State of California;

That the actual cash value of said franchise was on said first Monday in March, 1914, the sum of five hundred (500) dollars;

That the said assessment and levy aforesaid was and is void under section 1 of amendment XIV of the Constitution of the United States, because thereby the said State Board of Equalization assessed and taxed the said company on property the situs of which was
11 and is without the State of California, and beyond the jurisdiction of the said state, for the purpose of taxation;

"That at all times mentioned in said complaint the said company possessed and owned a good will of a substantial value and that no deduction was made by the said State Board of Equalization therefor."

VII.

That this plaintiff is, and at all times since said assesment has been, dissatisfied therewith; that on or about the 1st day of August, 1914, and before the said taxes became delinquent, upon the order given and made as provided by said article of said Constitution, and said chapter of the said statute by said Controller, Oceanic Steamship Company paid the first installment of said tax, to wit: the sum of six hundred (600) dollars to said Treasurer; that at the time of said payment said company filed with said Controller a written protest, a copy of which is hereto annexed and made a part hereof, as fully as though incorporated herein, and marked "Exhibit A;" that on or about the 1st day of February, 1915, and before the said taxes became delinquent, upon the order given and made as provided by said article of said Constitution and the said chapter of said statute by said Controller, Oceanic Steamship Company paid the second installment of said tax, to wit: the sum of six hundred (600) dollars, to said Treasurer; that at the time of said payment said company filed with said Controller a written protest, a copy of
12 which is hereto annexed and made a part hereof, as fully as though incorporated herein, and marked "Exhibit B;"

VIII.

That said company has paid taxes upon all of its property, both real and personal, in the State of California, for the fiscal year ending June 30, 1914, and upon its property, both real and personal, in other states and territories of the United States, to those states and territories wherein such property is situated;

IX.

That heretofore, and prior to the commencement of this action, and prior to the demand by plaintiff hereinafter set forth, Oceanic Steamship Company sold, assigned and transferred and set over unto this plaintiff, all of its right, title and interest in and to the said taxes paid under protest, as aforesaid, and all claims and demands therefor;

X.

That on or about the 10th day of February, 1915, at the City of Sacramento, State of California, this plaintiff demanded of said defendant, Friend W. Richardson, as Treasurer aforesaid, that said sums so paid as aforesaid, be returned or repaid to plaintiff, but that said Friend W. Richardson, as Treasurer aforesaid, re-
13 fused and neglected, and ever since has refused and neglected to return or repay the plaintiff the said sums, or either of them, or any part thereof;

Wherefore, plaintiff prays judgment for the sum of twelve hundred (1,200) dollars, together with interest from the date of said payments to the State Treasurer, and for his costs of action, and for such other and further relief as to the court may seem proper.

MORRISON, DUNNE, & BROBECK,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Edwin Schwab, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

EDWIN SCHWAB.

Subscribed and sworn to before me, this 23d day of November, 1916.

[SEAL.]

R. B. TREAT,
Notary Public in and for the City and County of San Francisco, State of California.

14 EXHIBIT A.

Protest on Payment of First Instalment of State Corporation Franchise Tax for the Year 1914.

To Honorable John S. Chambers, State Controller, and Honorable E. D. Roberts, State Treasurer, Sacramento, California:

You and each of you are hereby notified that Oceanic Steamship Company, a corporation incorporated under and by virtue of the laws of California, hereinafter denominated protestant, and not a company of any of the kinds mentioned in sections 2, 3 or 4 of the act of the legislature next hereinafter referred to, does hereby involuntarily, and under protest, pay to the State Treasurer, on the said Controller's order the sum of six hundred dollars ($600.00), being the first instalment of taxes levied against and assessed to the said protestant by virtue of section 14 of article XIII of the Constitution of the State of California, and the act of the Legislature of the State of California, entitled: "An act to carry into effect the provisions of section 14 of article XIII of the Constitution of the State of California, as said Constitution was amended November 8th, 1910, providing for the separation of state from local taxation and providing for the taxation of public service and other corporations, banks and insurance companies for the benefit of the
15 state, all relating to revenue and taxation," approved April 1st, 1911.

That said payment of said tax, and of every part thereof, is made under duress, coercion and compulsion of law, and is made to prevent the penalties, provided to be imposed, under said section of said Constitution and said act of the Legislature for non-payment of said tax, from being enforced against protestant.

That the assessment of said tax against protestant was made under and by virtue of said section of the said Constitution and section 5 of said act of the Legislature; and that the whole of said assessment is void and unauthorized for each of the following reasons:

1. Said section 5 of said act of the Legislature is void in so far as, thereby, a tax is levied upon the franchise, of protestant.

Said section of the said act of the Legislature is so void because:

(*a*) The only franchise of which protestant is, or ever was, possessed, and which is, or ever was, within the State of California, is the actual exercise of the right to do business as a corporation in this state.

(*b*) A large part of protestant's business, in this state, now consists, and ever since more than a year prior to the first Monday in March, 1914, has consisted, of commerce between this state
16 and other states and foreign countries.

That by section 5 of said act of the Legislature a tax is levied, not only upon the exercise by protestant of the right to do

intrastate business in the State of California, but is also levied upon the exercise of the right by protestant to do interstate business in this state; that, under said section, the tax therein provided is levied as a whole upon the exercise of both of such last mentioned rights by protestant; and that, for this reason, in so far as by said section of the said act a tax is levied upon the said franchise possessed and exercised by protestant, in this state, the said act contravenes section 8 of article 1 of the Constitution of the United States.

2. That the assessments of said tax against protestant by the State Board of Equalization, under the said act of the Legislature, is void.

(*a*) Because the act under which said tax was assessed is void for the reasons hereinabove set forth.

(*b*) That said assessment was and is null and void for the reason that a substantial part of the property belonging to said protestant now is situated, and for more than two years immediately prior to the first Monday in March, 1914, has been permanently situated and used without the State of California, and during all of
17 said times the said protestant has been engaged in business outside of the State of California.

(*c*) That said assessment was and is null and void for the reason that said protestant now is, and for more than two years immediately prior to the first Monday in March 1914, was engaged in interstate commerce; that the business for which the said protestant was and is chartered is of itself commerce; that the local and domestic business of the said protestant within the State of California is so connected with interstate commerce as to render a tax upon it a burden upon its interstate business.

That said State Board of Equalization in assessing the franchises of the said protestant did, in pursuance of a fixed rule and general system, the result of which was necessarily discriminatory and inequitable, arrive at the value of said franchise in the following manner, to wit:

That said State Board of Equalization did deduct from the market or actual value of all of the shares of the capital stock of the said protestant issued and outstanding on the first Monday in March, 1914 (which said value included the value of all property of the said protestant situated without the State of California), the actual value of all property of the said protestant situated both within and
18 without said state, and that a certain percentage of the remainder (the exact percentage being unknown to the protestant herein) after said deduction was so made, amounting to one hundred and twenty thousand dollars ($120,000), was determined by the said State Board of Equalization to be the value of the franchise of the said protestant, and the franchise of the said protestant was thereupon assessed by said State Board of Equalization for the said amount of one hundred and twenty thousand dollars ($120,000), and a tax at the rate of one per cent (1%) upon said amount,

amounting to twelve hundred dollars ($1200) was thereupon levied on said franchise; that said market value of the said shares of capital stock of the said protestant was at all times materially increased by reason of and in great part due to, the ownership and use by the said protestant of the said property outside of the State of California.

That the actual cash value of said franchise was on said first Monday in March, 1914, the sum of five hundred dollars ($500).

That the said assessment and levy aforesaid was and is void under section 1 of amendment XIV of the Constitution of the United States, because thereby the said State Board of Equalization assessed and taxed the said protestant on property the situs of which was and is without the State of California and beyond the juris-
19 diction of the said state for the purpose of taxation.

(*d*) That the said assessment is void for the reason that, in determining the value of the franchise of protestant, the said State Board of Equalization made no due or proper deduction for good will of protestant, contrary to the provisions of section 5 of the said act of the Legislature.

In assessing said tax, and in computing the actual value of the franchise of protestant, said State Board of Equalization made no due or proper deduction for good will, but, on the contrary, included in their computed estimate of the actual cash value of said franchise, in violation of law, a large part of the actual cash value of the good will of protestant.

Dated: August 15th, 1914.

[SEAL.] OCEANIC STEAMSHIP COMPANY,
By A. B. SPRECKELS,
Vice President.

Received the within protest on this 15th day of August, 1914, contemporaneously with the payment of the taxes mentioned therein.

JOHN S. CHAMBERS,
Controller of the State of California,
By D. A. MOULTON,
Deputy.

E. D. ROBERTS,
Treasurer of the State of California,
By —— ——,
Deputy.

20 EXHIBIT B.

Protest on Payment of Second Instalment of State Corporation Franchise Tax for the Year 1914.

To Honorable John S. Chambers, State Controller, and Honorable Friend W. Richardson, State Treasurer, Sacramento, California:

You and each of you are hereby notified that Oceanic Steamship Company, a corporation incorporated under and by virtue of the laws

of California, hereinafter denominated protestant, and not a company of any of the kinds mentioned in sections 2, 3 or 4 of the act of the Legislature next hereinafter referred to, does hereby involuntarily, and under protest, pay to the State Treasurer, on the said Controller's order, the sum of six hundred dollars ($600.00), being the second instalment of taxes levied against and assessed to the said protestant by virtue of section 14 of article XIII of the Constitution of the State of California, and the act of the Legislature of the State of California, entitled: "An act to carry into effect the provisions of section 14 of article XIII of the Constitution of the State of California, as said Constitution was amended November 8th, 1910, providing for the separation of state from local taxation and providing for the taxa-
21 tion of public service and other corporations, banks and insurance companies for the benefit of the state, all relating to revenue and taxation," approved April 1st, 1911.

That the assessment of said tax against protestant was made under under duress, coercion and compulsion of law, and is made to prevent penalties, provided to be imposed, under said section of said Constitution and said act of the Legislature for non-payment of said tax, from being enforced against protestant.

That the assesment of said tax against protestant was made under and by virtue of said section of the said Constitution and section 5 of said act of the Legislature; and that the whole of said assessment is void and unauthorized for each of the following reasons:

1. Said section 5 of said act of the Legislature is void in so far as, thereby, a tax is levied upon the franchise of protestant.

Said section of the said act of the legislature is so void because:

(*a*) The only franchise of which protestant is, or ever was, possessed, and which is, or ever was, within the State of California, is the actual exercise of the right to do business as a corporation in this state.

(*b*) A large part of protestant's business, in this state, now consists, and ever since more than a year prior to the first Mon-
22 day in March, 1914, has consisted, of commerce between this state and other states and foreign countries.

That by section 5 of said act of the Legislature a tax is levied, not only upon the exercise by protestant of the right to do intrastate business in the State of California, but is also levied upon the exercise of the right by protestant to do interstate business in this state; that, under said section, the tax therein provided is levied as a whole upon the exercise of both of such last mentioned rights by protestant; and that, for this reason, in so far as by said section of the said act a tax is levied upon the said franchise possessed and exercised by protestant, in this state, the said act contravenes section 8 of article 1 of the Constitution of the United States.

2. That the assessments of said tax against protestant by the State Board of Equalization, under the said act of the legislature, is void.

(*a*) Because the act under which said tax was assessed is void for the reasons hereinabove set forth.

(*b*) That said assessment was and is null and void for the reason that a substantial part of the property belonging to said protestant now is situated, and for more than two years immediately prior to the first Monday in March, 1914, has been permanently situated and used without the State of California, and during all of said times the said protestant has been engaged in business outside of the State of California.

(*c*) That said assessment was and is null and void for the reason that said protestant now is, and for more than two years immediately prior to the first Monday in March, 1914, was engaged in interstate commerce; that the business for which the said protestant was and is chartered is of itself commerce; that the local and domestic business of the said protestant within the State of California is so connected with interstate commerce as to render a tax upon it a burden upon its interstate business.

That said State Board of Equalization in assessing the franchises of the said protestant did, in pursuance of a fixed rule and general system, the result of which was necessarily discriminatory and inequitable, arrive at the value of said franchise in the following manner, to wit:

That said State Board of Equalization did deduct from the market or actual value of all of the shares of the capital stock of the said protestant issued and outstanding on the first Monday in March, 1914 (which said value included the value of all property of
24 the said protestant situated without the State of California), the actual value of all property of the said protestant situated both within and without said state, and that a certain percentage of the remainder (the exact percentage being unknown to the protestant herein) after said deduction was so made, amounting to one hundred and twenty thousand dollars ($120,000), was determined by the said State Board of Equalization to be the value of the franchise of the said protestant, and the franchise of the said protestant was thereupon assessed by said State Board of Equalization for the said amount of one hundred and twenty thousand dollars ($120,000), and a tax at the rate of one per cent. (1%) upon said amount, amounting to twelve hundred dollars ($1,200) was thereupon levied on said franchise; that said market value of the said shares of capital stock of the said protestant was at all times materially increased by reason of and in great part due to, the ownership and use by the said protestant of the said property outside of the State of California.

That the actual cash value of said franchise was on said first Monday in March, 1914, the sum of five hundred dollars ($500).

That the said assessment and levy aforesaid was and is void under section 1 of amendment XIV of the Constitution of the
25 United States, because thereby the said State Board of Equalization assessed and taxed the said protestant on property the situs of which was and is without the State of California and beyond the jurisdiction of the said state for the purpose of taxation.

(*d*) That the said assessment is void for the reason that, in determining the value of the franchise of protestant, the said State Board of Equalization made no due or proper deduction for good will of protestant, contrary to the provisions of section 5 of the said act of the Legislature.

In assessing said tax, and in computing the actual value of the franchise of protestant, said State Board of Equalization made no due or proper deduction for good will, but, on the contrary, included in their computed estimate of the actual cash value of said franchise, in violation of law, a large part of the actual cash value of the good will of protestant.

Dated, January 30th, 1915.

[SEAL.] OCEANIC STEAMSHIP COMPANY,
By H. W. THOMAS,
Secretary.

Received the within protest contemporaneously with the payment of the taxes referred to above.

26 Dated, January 30th, 1915.

JOHN S. CHAMBERS,
State Controller.
By D. A. MOULTON.

#14819. Received Jan. 30, 1915. Friend Wm. Richardson, State Treasurer, by W. H. Johnstone, Deputy.

(Endorsed:) Receipt of a copy of the within amended complaint is hereby admitted this 23rd day of November, 1916.

U. S. WEBB,
Attorney General,
Attorney for Defendant.

Filed Nov. 28, 1916.
H. I. MULCREVY,
Clerk,
By J. F. DUNWORTH,
Deputy Clerk.

[Title of Court and Cause.]

Answer to Amended Complaint.

Now comes the above named defendant and answering plaintiff's amended complaint on file herein, alleges and denies as follows:

27 I.

Answering paragraph VI of said complaint defendant admits that said State Board of Equalization assessed the franchise of said company; denies that said State Board of Equalization in assessing the franchise of said company followed or pursued a or any fixed rule or general system and denies that the manner or method followed

by said State Board of Equalization in assessing such franchise for any reason whatsoever resulted in discrimination or in equity and denies that the method pursued by said State Board of Equalization in assessing said franchise produced a result which was unnecessarily or at all discriminatory or necessarily or at all inequitable.

Denies that the actual cash value of said franchise was on said first Monday in March, 1914, the sum of but $500, and in this behalf alleges that the value of said franchise at said date was fixed and determined by said State Board of Equalization to be the sum of $120,000, and that the value of said franchise was at said date actually the sum of $120,000.

Denies that said assessment and levy or said assessment or levy mentioned in plaintiff's amended complaint was and is or was
28 or is void under any law or for any reason whatsoever; and denies that by said or any assessment of plaintiff's franchise said State Board of Equalization assessed and taxed or assessed or taxed said company on any property the situs of which was and is or was or is without the State of California or beyond the jurisdiction of the said State of California for the purposes of assessment.

Wherefore defendant prays that plaintiff take nothing by this action and that defendant recover his costs.

U. S. WEBB,
Attorney General of the State of California.
RAYMOND BENJAMIN,
Chief Deputy Attorney General.

(Endorsed:) Due service of the within answer admitted this 28th day of November, 1916.

MORRISON, DUNNE & BROBECK,
Attorneys for Plaintiff.

Filed Nov. 28, 1916.

H. I. MULCREVY,
Clerk,
By J. F. DUNWORTH,
Deputy Clerk.

29 [Title of Court and Cause.]

Notice of Motion for Judgment on the Pleadings.

To Friend W. Richardson, Defendant in the above-entitled action, and to U. S. Webb and Raymond Benjamin, his attorneys:

You and each of you will please take notice:

That on Friday, the 8th day of December, 1916, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, at the City Hall, in the City and County of San Francisco, the above named plaintiff will move the court for a judgment on the pleadings in the said suit.

Said motion will be based upon the ground that the answer of the said defendant does not state facts sufficient to constitute a defense, and will be heard upon all the files.

MORRISON, DUNNE & BROBECK,
Attorneys for Plaintiff.

(Endorsed:) Receipt of a copy of the within notice of motion for judgment on pleadings is hereby admitted this 29th day of November, 1916.

U. S. WEBB,
Attorney for Defendant.

Filed Nov. 29, 1916.

H. I. MULCREVY,
Clerk,
By H. BRUNNER,
Deputy Clerk.

30 [Title of Court and Cause.]

Bill of Exceptions.

Be it remembered tha ton the 29th day of November, 1916, and within the time required by law, the plaintiff above named duly served upon the above named defendant a notice of motion that on Friday, the 8th day of December, 1916, he would move the above entitled court for a judgment on the pleadings in the said suit on the ground that the answer of the said defendant on file therein did not state facts sufficient to constitute a defense. Thereafter, and on the said 8th day of December, 1916, and within the time required by law, and at the hour of 10 o'clock A. M. of said day, the said plaintiff being represented by his attorneys, Morrison, Dunne & Brobeck, and R. L. McWilliams, and the defendant being represented by his attorneys, U. S. Webb and Raymond Benjamin, the plaintiff, in accordance with the said notice of motion, duly moved the said court for a judgment on the pleadings in the said suit on the ground that the answer of the said defendant did not state facts sufficient to constitute a defense to the complaint of the plaintiff. The said motion was taken under advisement by the said court, and thereafter, and on the 2d day of March, 1917, and in the
31 absence of the said parties and their attorneys, the said motion was denied.

MORRISON, DUNNE & BROBECK,
Attorneys for Plaintiff.

The within bill of exceptions is true and correct and may be settled and allowed.

It is further stipulated that the pleadings and notice of motion referred to therein need not be set out in said bill of exceptions at

length, but that the same may be included instead in the printed transcript on appeal.

U. S. WEBB,
RAYMOND BENJAMIN,
Attorneys for Defendant.

The within bill of exceptions is hereby settled and allowed, this 23d day of May, 1917.

GEO. A. STURTEVANT,
Judge.

(Endorsed:) Filed May 23, 1917. H. I. Mulcrevy, Clerk, by P. R. McMahon, Deputy Clerk.

[Title of Court and Cause.]

Judgment.

The above entitled action having duly come on for trial, the parties being represented by their respective counsel, and the
32 plaintiff having failed to offer any evidence in support of his complaint and having stated that he elected to stand upon his motion for judgment on the pleadings heretofore made;

It is ordered that judgment be, and the same is hereby given for the defendant.

Done in open court this 25th day of May, 1917.

GEO. A. STURTEVANT,
Judge.

Recorded May 26, 1917, 11 o'clock A. M. volume 108, page 20.
H. I. MULCREVY,
Clerk,
By ARTHUR FLAHERTY,
Deputy Clerk.

(Endorsed:) Filed May 25, 1917. H. I. Mulcrevy, Clerk, by J. J. Rafferty, Deputy Clerk.

[Title of Court and Cause.]

Clerk's Certificate to Judgment Roll.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, H. I. Mulcrevy, county clerk of the City and County of San Francisco, State of California, and ex-officio clerk of the Superior Court, do hereby certify the foregoing to be a true copy of the
33 judgment entered in the above-entitled cause, and recorded in judgment book 108 of said court, at page 20. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said cause.

Witness my hand and seal of said Superior Court this 28th day of May, A. D. 1917.

[SEAL.]

H. I. MULCREVY,
Clerk,
By F. W. DUNN,
Deputy Clerk.

(Endorsed:) Filed May 28, 1917. H. I. Mulcrevy, Clerk, by F. W. Dunn, Deputy Clerk.

Recorded judgment book 108, page 20.

[Title of Court and Cause.]

Notice of Appeal.

Notice is hereby given that pursuant to the provisions of section 941 B of the Code of Civil Procedure, the above-named plaintiff does hereby appeal to the Supreme Court of the State of California, from the judgment rendered by the above-entitled court in the above-entitled action, on the 25th day of May, 1917, which said judgment was thereafter, and on the 26th day of May, 1917, recorded in book 108 of judgments at page 20 thereof.

34 Dated, June 20th, 1917.

MORRISON, DUNNE & BROBECK,
Attorneys for said Plaintiff.

(Endorsed:) Filed Jun. 20, 1917. H. I. Mulcrevy, Clerk, by H. Brunner, Deputy Clerk.

Stipulation to Transcript.

It is hereby stipulated that the foregoing transcript on appeal is correct; that it contains full, true and correct copies of all the papers therein set forth now on file in the office of the county clerk of the City and County of San Francisco, State of California; that the minute orders therein contained are full, true and correct copies thereof as made and entered in the minutes of the Superior Court; that the said foregoing papers shall constitute the transcript on appeal in this cause and that the appeal may be heard and determined thereon.

Dated, July 31st, 1917.

U. S. WEBB,
Attorney General of the State of California;
RAYMOND BENJAMIN,
Chief Deputy Attorney General of the State of California,
Attorneys for Respondent.
MORRISON, DUNNE & BROBECK,
Attorneys for Appellant.

25 *Clerk's Certificate to Transcript.*

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, H. I. Mulcrevy, county clerk of the City and County of San Francisco, State of California, and ex-officio clerk of the Superior Court in and for said city and county, hereby certify that I have compared the foregoing transcript with the original papers in said action, now on file in my office, and with the orders therein made and entered on the minutes of said court, and that the papers and orders therein contained are full, true and correct copies of the originals on file in this office, and of the whole thereof.

I further certify that the erasures and interlineations appearing in the foregoing transcript were made before certifying thereto.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court this — day of July, 1917.

[SEAL.] H. I. MULCREVY,
Clerk,

By —— ——,
Deputy Clerk.

36 Filed Jan. 30, 1922. B. Grant Taylor, Clerk, by Erb, S. F. Deputy.

In Bank, January 30, 1922.

S. F., No. 8452.

EDWIN SCHWAB, Plaintiff and Appellant,

v.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant and Respondent.

Appeal by Plaintiff from a Judgment of the Superior Court, City and County of San Francisco, George A. Sturtevant, Judge, in an Action to Recover Taxes Paid under Protest.

Affirmed.

(1) Taxation—Corporate Intangible Property—Value of Property Derived from Interstate and Foreign Commerce—Power of State to Tax.—State taxation of corporate intangible property of a domestic corporation located in the state of its actual value does not constitute an interference with interstate or foreign commerce, despite the fact that such intangible property derives its value from interstate and foreign commerce.

On hearing after judgment in District Court of Appeal, First District, Division One (32 Cal. App. Dec. 171), affirming judgment of

Superior Court in an action to recover taxes paid under protest. Judgment of Superior Court affirmed.

For Appellant—Morrison, Dunne & Brobeck; H. W. Clark, of Counsel.

For Respondent—U. S. Webb, Attorney-General; Frank L. Guerena, Deputy Attorney-General.

This is an action to recover taxes paid under protest by the
37 Oceanic Steamship Company to the state of California. After answer plaintiff moved for a judgment upon the pleadings, which was denied. At the trial plaintiff submitted the case upon the admission in the pleadings, without offering any evidence upon the issues, and judgment was rendered in favor of the defendant. Plaintiff appeals.

The Oceanic Steamship Company is a corporation organized under the laws of the state of California and engaged exclusively in the business of transporting freight and passengers between San Francisco and the Hawaiian islands and certain foreign countries. The company has maintained offices in San Francisco for the transaction of its interstate and foreign business, but has conducted no other business in this state except the purchase of its fuel and supplies used in its transportation business.

The state board of equalization assessed the franchise of the company, or its "corporate excess" (Miller & Lux, Incorporated, v. Richardson, 182 Cal. 115) at $800,000 and apportioned $120,000, or 15 per cent thereof to California as representing in the judgment of the board of equalization the proportion of the intangible property of the corporation properly taxable in California. Plaintiff alleged that this value did not exceed $500, but the answer denied that allegation and affirmatively alleged the value to be the amount of the assessment, to-wit, $120,000, and the submission of the case by the plaintiff upon the pleadings without evidence was an admission of this affirmative allegation (see Hale v. Gardiner, 62 Cal. Dec. 211). It therefore stands admitted that the tax was not excessive, and if the state has jurisdiction to impose the tax it is
38 a proper exercise of that jurisdiction.

It is contended by appellant that as the state has imposed a property tax upon the tangible property of the corporation within the state this tax upon the intangible property of the corporation is in effect a tax upon interstate commerce, and therefore violative of the interstate commerce clause of the constitution of the United States (U. S. Const. art. I, sec. 8). (1) Inasmuch as the Supreme Court of the United States has uniformly held that courts look to the substance and effect of such taxation rather than its form in order to determine whether or not interstate commerce is illegally interfered with (Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 698; Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 85, 86; Kansas City Ry. Co. v. Kansas, 240 U. S. 227, 233; Looney v. Crane Co., 245 U. S., 178, 189) it would seem clear that state taxation of corporate intangible property of a domestic corporation located in a

state at its actual value would not in fact constitute such interference regardless of the fact that such intangible property derives its value from interstate and foreign commerce (see Pullman Co. v. Richardson, 61 Cal. Dec. 489, for a discussion of this matter). A different rule prevails as to a foreign corporation when its business in this state is exclusively interstate commerce (People v. Alaska etc. Co. 182 Cal. 207). If this question was at any time doubtful it has been set at rest by decisions of the United States Supreme Court since this case was on appeal.

39 The decision of that court in Cream of Wheat Company v. County of Grand Forks, North Dakota, 253 U. S. 325, clearly upholds the authority of the state in imposing the tax in the case at bar. There a domestic corporation which had no tangible, real or personal property within the state of its domicile and no paper evidence of intangible property therein was held taxable in the state of its domicile for its intangible property which we have called the "corporate excess" or "franchise." (Miller & Lux v. Richardson supra). In the opinion it is said:

"Its manufacturing, commercial and financial business was conducted wholly without the state; and it had not at any time during any of those years within the state any tangible property, real or personal or any papers by which intangible property is customarily evidenced. Its property as distinguished from its franchise, is alleged to have been taxed in states other than North Dakota. * * *

"The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of that state. As said by Mr. Chief Justice Taney, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' Bank of Augusta v. Earle, 13 Pet. 519, 588. The fact that its property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a state may not tax a resident for property which has acquired a permanent *situs* beyond its boundaries. * * * The limitation upon the power of taxation does not apply even to tangible personal property without the state of the corporation's domicile if, like a sea-going vessel, the property has no permanent *situs* anywhere. Southern Pacific Co. v. Kentucky, 222 U. S. 63, 68. *Nor has it any application to intangible property,* Union Refrigerator Transit Co. v. Kentucky, *supra,* p. 205; Hawley v. Malden, 232 U. S. 1, 11, even though the property is also

40 taxable in another state by virtue of having acquired a 'business *situs*' there, Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 59. As stated in that case: 'It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. Flint v. Stone Tracey Co., 220 U. S. 107, 146, 162 *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained." (Italics ours.) Cream of Wheat Co. v. County of Grand Forks, *supra.*)

The power of the state to make this assessment is fully sustained in Underwood Typewriter Co. v. Chamberlain, 41 Sup. Ct. Rep. No. 4, p. 45. In that case the corporation was taxed two per cent upon its net income claimed by the state to have been earned from business carried on within the state. The amount of this business was required by statute to be ascertained in the following manner: "If the company's net profits are derived principally from ownership, sale or rental of real property, or from the sale or use of tangible personal property, the tax is imposed on such proportion of the whole net income as fair cash value of the real and the tangible personal property within the state bears to the fair cash value of all the real and tangible personal property of the company. If the net profits of the company are derived principally from intangible property, the tax is imposed upon such proportion of the whole net income as the gross receipts within the state bear to the total gross receipts of the company." It was thus determined by the state authorities that forty-seven per cent of the net receipts of the company were attributable to business done in Connecticut, although its net re-
41 ceipts in Connecticut were only $42,942.18, as compared with $1,293,643.95 received in other states. It was claimed that the state authorities had violated the interstate provisions of the United States constitution and the fourteenth amendment thereto. Upon the first proposition the supreme court said:

"A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even it if takes the form of a tax for the privilege of exercising its franchise within the state. Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 695. This tax is based upon the net profits earned within the state. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed, mainly from interstate commerce is settled. U. S. Glue Co. v. Oak Creek, 247 U. S. 321; Shaffer v. Carter, 252 U. S. 37, 57; Peck & Co. v. Lowe, 247 U. S. 165. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause."

On the question of the alleged violation of the fourteenth amendment by taxing property outside the state, the court in that case said:

"But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other states. In this it was typical of a large part of the manufacturing business conducted in the state. The Legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was mean to reach, only the profits earned within the state."

42 It was also held that the taxpayer had the burden of proving that forty-seven per cent of its profits was not reasonably attributable to the business within the state. (Underwood Typewriter Co. v. Chamberlain, supra.) This principle would lead to the conclusion in the case at bar that the admission of the plaintiff that fifteen per cent of its intangible property was located within the state was fatal to its recovery, because there is not only no proof of an unreasonable or unjust application of the law to the acts, but on the contrary an express admission of its just application.

The fact that the corporation involved is engaged in interstate commerce does not deprive the state of the power to tax the franchise of a domestic corporation even though the privilege of being a corporation derived its value in part from interstate commerce. (Kansas City etc. Ry. Co. v. Botkin, 240 U. S. 227; Pullman Co. v. Richardson, supra).

The case of Looney, Attorney-General of the State of Texas, v. Crane Company, 245 U. S. 178, relied upon by the appellant, is not inconsistent with the conclusion we have reached in this case. It was held in that case that the proportion of the assets of the corporation taxed in Texas was so greatly in excess of the amount which was justly taxable therein or could be justly deemed to be located therein, as to constitute a burden upon interstate commerce. It was held that under the facts there presented the tax was a direct burden upon interstate commerce and was imposed upon property which
43 was wholly beyond the confines of the state and not subject to its jurisdiction and was thus a taking of property without due process of law. No such case is presented here.

From the foregoing decisions it is clear that the state had authority to tax the intangible property of the Oceanic Steamship Company within the state, and that such tax was not a burden upon interstate or foreign commerce prohibited by the federal constitution.

Judgment affirmed.

WILBUR, *J.*

We concur:
SLOANE, *J.*
SHURTLEFF, *J.*
LENNON, *J.*
SHAW, *C. J.*
LAWLOR, *J.*

44 [Endorsed:] S. F. No. 8452. In Bank. January 30, 1922. Edwin Schwab, Plaintiff and Appellant, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant and Respondent. Opinion of the Supreme Court of the State of California.

15 Filed Mar. 1, 1922. B. Grant Taylor, Clerk, by J., S. F. Deputy.

In Bank.

S. F., No. 8452.

SCHWAB

vs.

RICHARDSON, Treasurer.

By the COURT:

Rehearing denied February 27, 1922. (All concur. Lennon, J., absent; Richards, J. pro tem., acting.)

SHAW, *C. J.*

46 In the Supreme Court of the State of California, Bank.

San Francisco, No. 8452.

EDWIN SCHWAB, Plaintiff, Appellant,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant, Respondent.

On Appeal from the Superior Court in and for the City and County of San Francisco.

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the City and County of San Francisco in the above entitled cause, be and the same is hereby affirmed. Respondent to recover the costs of appeal.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 30th day of January 1922, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 2d day of March, A. D. 1922.

[SEAL.]

B. GRANT TAYLOR,
Clerk,

By I. M. JOHNSON,
Deputy.

47 Original.

In the Supreme Court of the State of California.

S. F., No. 8452.

EDWIN SCHWAB, Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Petition for Writ of Error.

Comes now the above-named Edwin Schwab, Plaintiff in Error, and says:

That on the 30th day of January, 1922, judgment in the above-entitled cause was rendered and entered by this court in favor of Friend W. Richardson, as Treasurer of the State of California, Defendant in Error, and thereafter a petition for re-hearing was filed, presented, considered, and denied by this court, whereupon said judgment and decision became final; that said Edwin Schwab was and is aggrieved in that, in said judgment and in the proceedings had prior thereto, in the above-entitled cause, certain errors were committed to his prejudice and to the prejudice of his assignor, Oceanic Steamship Company, a corporation; that in the record and proceedings in said cause it will appear that there was drawn in question the validity of an authority, exercised under the State of California, on the ground of the repugnancy thereof to the
48 Constitution of the United States, in that the exercise thereof deprived and deprives the Oceanic Steamship Company, assignor of this plaintiff in error, and this plaintiff in error, under the guise of taxation, of property without due process of law, denies said company and this plaintiff in error of the equal protection of the laws, and constitutes an attempt to regulate interstate and foreign commerce; and that the decision and judgment of said Supreme Court of the State of California was in favor of the validity of the exercise of said authority, all of which is apparent in the record and proceedings in said cause, and is specifically set forth in the Assignment of Errors filed herewith.

Wherefore said Edwin Schwab prays that a Writ of Error may issue to the Supreme Court of the State of California for the correcting of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein, may be sent to the Supreme Court of the United States.

MORRISON, DUNNE & BROBECK,
HERBERT W. CLARK,
Attorneys for Edwin Schwab, Plaintiff in Error.

49 [Endorsed:] 903. Original. *No.* S. F. No. 8452. In the Supreme Court of the State of California. Edwin Schwab, Plaintiff in Error, vs. Friend W. Richardson as Treasurer of the State of California, Defendant in Error. Petition for Writ of Error. Filed Apr. 28, 1922. B. Grant Taylor, Clerk, by A., Deputy. Morrison, Dunne & Brobeck, Attorneys at Law, Crocker Building, San Francisco, Cal.

50 Original.

In the Supreme Court of the State of California.

S. F., No. 8452.

EDWIN SCHWAB, Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Assignment of Error- on Writ of Error to the Supreme Court of the State of California.

Comes now the plaintiff in error in the above-entitled cause and avers and shows that in the record and proceedings in said cause, the Supreme Court of the State of California erred to the grievous injury and wrong of plaintiff herein, and to the prejudice, and against the rights of the plaintiff in error in the following particulars, to-wit:

1. That the said Supreme Court erred in holding that the assessment and levy of taxes complained of by plaintiff in error in said cause did not constitute an attempt to deprive plaintiff, and plaintiff's assignor, Oceanic Steamship Company, under the guise of taxation, of property without due proces of law;

2. That said Supreme Court erred in holding that said assessment and levy of taxes complained of by plaintiff in said cause
51 were not an attempt, under the guise of taxation, to deny said Oceanic Steamship Company, and this plaintiff, its assignee, the equal protection of the law;

3. That said Supreme Court erred in holding that the assessment and levy of taxes complained of by plaintiff in said cause were not an attempt to regulate interstate and foreign commerce;

4. That said Supreme Court erred in holding that the said assessment and levy of taxes complained of by plaintiff in said cause were not a burden upon interstate or foreign commerce;

5. That said Supreme Court erred in not reversing the judgment of the trial court.

Wherefore, for these and other manifest errors appearing in the record, the said Edwin Schwab, plaintiff in error, prays that the judgment of the said Supreme Court of the State of California, be reversed and set aside, and held for naught, and that judgment be rendered for plaintiff in error, granting him his rights under the laws of the United States.

MORRISON, DUNNE & BROBECK,
HERBERT W. CLARK,
Attorneys for Edwin Schwab, Plaintiff in Error.

52 [Endorsed:] Original. *No.* S. F. No. 8452. In the Supreme Court of the State of California. Edwin Schwab, Plaintiff in Error, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant in Error. Assignment of Error on Writ of Error to the Supreme Court of the State of California. Filed Apr. 28, 1922. B. Grant Taylor, Clerk, by A., Deputy. Morrison, Dunne & Brobeck, Attorneys at Law, Crocker Building, San Francisco, Cal.

53 In the Supreme Court of the State of California.

S. F., No. 8452.

EDWIN SCHWAB, Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Allowance of Writ of Error.

Petition for Writ of Error having been filed herein and presented to this court by Edwin Schwab, Plaintiff and Appellant, and Plaintiff in Error, in the above entitled cause, praying for the allowance of a Writ of Error intended to be urged by him, and that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States, now upon consideration of the said petition,

It is ordered by this court that a Writ of Error be allowed, as prayed; provided, however, that bond be given in the penal sum of Five Hundred Dollars ($500), conditioned that said plaintiff in error shall prosecute his said Writ of Error to effect, and, if he fail to make his plea good, shall answer all damages and costs.

In testimony whereof, witness my hand this 28th day of April, 1922.

SHAW, *C. J.*
Chief Justice of the Supreme Court of the State of California.

54 [Endorsed:] Clerk's Office Copy. No. S. F., No. 8452. In the Supreme Court of the State of California. Edwin Schwab, Plaintiff in Error, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant in Error. Allowance of writ of Error. Filed (Copy) Apr. 28, 1922. B. Grant Taylor, Clerk, By —— ——, Deputy. Morrison, Dunne & Brobeck, Attorneys at Law, Crocker Building, San Francisco, Cal.

55 Original.

In the Supreme Court of the United States.

S. F., No. 8452.

EDWIN SCHWAB, Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of California, before you, January 30, 1922, said court being the highest court of law or equity of the said State of California, in which a decision could be had in the said action between Edwin Schwab, designated as Edwin Schwab, Plaintiff and Appellant, and Friend W. Richardson, as Treasurer of the State of California, designated as Friend W. Richardson, as Treasurer of the State of Callifornia, Defendant and Respondent, wherein was drawn in question the validity of an authority exercised under said State of
56 California, on the ground of the repugnancy thereof to the Constitution of the United States, in that the exercise thereof deprives the Oceanic Steamship Company, assignor of Plaintiff in Error, and said Plaintiff in Error, under the guise of taxation, of property without due process of law, and denies said company and said plaintiff in error the equal protection of the laws, and constitutes an attempt to regulate interstate and foreign commerce, and wherein the decision of said Supreme Court of the State of California was in favor of the validity of the exercise of said authority, and manifest error hath appeared, to the great damage of the said Edwin Schwab, as by his complaint appears;

We being willing that error, if any hath been, should be duly corrected, and full and complete justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, D. C., within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 28th day of April,
57 A. D. 1922.

Done in the City and County of San Francisco, in the State of California, with the seal of the United States District Court for the Northern District of California attached.

[Seal of U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California.

Allowed by
LUCIEN SHAW,
Chief Justice of the Supreme Court of the State of California.

58 [Endorsed:] Original. In the Supreme Court of the United States. S. F., No. 8452. Edwin Schwab, Plaintiff in Error, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant in Error. Writ of Error. Filed Apr. 28, 1922. B. Grant Taylor, Clerk, by A., Deputy. Morrison, Dunne & Brobeck, Attorneys at Law, Crocker Building, San Francisco.

59 Clerk's Office Copy.

In the Supreme Court of the United States.

S. F., No. 8452.

EDWIN SCHWAB, Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents: That the undersigned are held and firmly bound unto the above-named Friend W. Richardson, as Treasurer of the State of California, in the sum of Five Hundred Dollars ($500), to be paid to him, and for the payment of which,

well and truly to be made, we bind ourselves, and each of us, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 28th day of April, A. D. 1922.

The condition of the above and foregoing obligation is such that Whereas, the above-named Edwin Schwab, plaintiff in error, seeks to prosecute his Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Supreme Court of the State of California;

Now, therefore, if the above-named plaintiff in error shall
60 prosecute his said Writ of Error to effect, and answer all costs and damages that may be adjudged, if he shall fail to make his plea good, then this obligation to be null and void; otherwise to be and remain in full force and virtue.

W. S. BROBECK, [SEAL.]
J. F. SHUMAN, [SEAL.]
Sureties.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

W. S. Brobeck and J. F. Shuman whose names are subscribed as sureties to the above and foregoing obligation, being severally and duly sworn, each for himself and not one for the other, says, that he is a resident and freeholder of the State of California, and is worth more than the sum in said bond specified as the penalty thereof, over and above all his just debts and liabilities, in property not by law exempt from execution in said State of California.

W. S. BROBECK.
J. F. SHUMAN.

Subscribed and sworn to before me this 28th day of April, 1922.
EUGENE P. JONES,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires August 18, 1923.

The above and foregoing bond approved this 28th day
61 of April, 1922.

LUCIEN SHAW,
Chief Justice of the Supreme Court of the State of California.

62 [Endorsed:] Clerk's Office Copy. In the Supreme Court of the United States. S. F., No. 8452. Edwin Schwab, Plaintiff in Error, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant in Error. Bond on Writ of Error. Copy. Filed Apr. 28, 1922. B. Brant Taylor, Clerk, by —— ——, Deputy. Morrison, Dunne & Brobeck, Attorneys at Law, Crocker Building, San Francisco.

63 Original.

In the Supreme Court of the United States.

S. F., No. 8452.

EDWIN SCHWAB, Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Friend W. Richardson, as Treasurer of the State of California, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within sixty (60) days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of California, wherein Edwin Schwab is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the
64 State of California, this 28th day of April, 1922.

LUCIEN SHAW,
Chief Justice of the Supreme Court of the State of California.

Attest:

[Seal of the Supreme Court of California.]

B. GRANT TAYLOR,
Clerk of the Supreme Court of the State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

We, the undersigned, attorneys of record for the defendant in error in the above-entitled cause, hereby acknowledge due service of the above citation, on this 28th day of April, 1922.

U. S. WEBB, *Attorney General;*
FRANK L. GUERENA,
Deputy Attorney General,
Attorneys for Defendant in Error, Friend W. Richardson, as Treasurer of the State of California.

65 [Endorsed:] Original. In the Supreme Court of the United States. S. F., No. 8452. Edwin Schwab, Plaintiff in Error, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant in Error. Citation. Filed Apr. 28, 1922. B. Grant Taylor, Clerk, by A., Deputy. Morrison, Dunne & Brobeck, Attorneys at Law, Crocker Building, San Francisco.

66 In the Supreme Court of the United States.

S. F., No. 8452.

EDWIN SCHWAB, Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant in Error.

Præcipe.

To the Clerk of the Supreme Court of the State of California:

You will please incorporate into the transcript of record on Writ of Error in the above-entitled cause, the following portions of the record:

1. Amended complaint;
2. Answer to amended complaint;
3. Notice of motion for judgment on the pleadings;
4. Bill of exceptions, together with the certificates and stipulation thereto attached;
5. Clerk's certificates to the Judgment Roll, and to the transcript on appeal now on file with you;
6. Judgment;
7. Notice of Appeal;
8. Stipulation to the transcript on appeal now on file with you;
9. Copy of Opinion of your Court;
10. Copy of order denying petition for re-hearing;
11. Remittitur;
12. Petition for Writ of Error;
13. Assignment of Error;
14. Order allowing Writ of Error;
15. Writ of Error;
16. Citation on Writ of Error;
17. Bond on Writ of Error;
18. This præcipe.

Dated: May 23, 1922.

MORRISON, DUNNE & BROBECK,
H. W. CLARK,
Attorneys for Plaintiff in Error.

67 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

We the undersigned, attorneys of record for the defendant in error in the above-entitled cause, hereby acknowledge due service of the original, and receipt of a copy of the above præcipe, on this 24th day of May, 1922.

U. S. WEBB.
FRANK L. GUERENA,
Attorneys for Defendant in Error, Friend W. Richardson, as Treasurer of the State of California.

68 [Endorsed:] In the Supreme Court of the United States. Edwin Schwab, Plaintiff in Error, vs. Friend W. Richardson, as Treasurer of the State of California, Defendant in Error. Præcipe. Filed Jun. 20, 1922. B. Grant Taylor, Clerk, by Erb, Deputy. Morrison, Dunne & Brobeck, Attorneys at Law, Crocker Building, San Francisco.

69 In the Supreme Court of the State of California.

EDWIN SCHWAB, Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California, Defendant and Respondent.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify the foregoing to be the record upon writ of error in the above entitled cause, consisting of the following documents, to-wit:

Transcript on appeal;
Opinion of Supreme Court of California;
Denial of rehearing;
Remittitur;
Original petition for writ of error;
Assignment of error;
Copy of order allowing writ of error;
Original writ of error;
Copy of bond on writ of error;
Original citation on writ of error;

all being full, true and correct as shown by the records and files of my office.

Witness my hand and the Seal of the Court, this 19th day of June, A. D. 1922.

[Seal of the Supreme Court of California.]

B. GRANT TAYLOR,
Clerk,

By I. ERB,
Deputy Clerk.

Endorsed on cover; File No. 29,037. California Supreme Court. Term No. 487. Edwin Schwab, plaintiff in error, vs. Friend W. Richardson, as treasurer of the State of California. Filed July 17th, 1922. File No. 29,037.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1922

No. [redacted]81

EDWIN SCHWAB,
Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

U. S. WEBB,
Attorney General of the State of California,
FRANK L. GUERENA,
Deputy Attorney General of the State of California,
Attorneys for Defendant in Error.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1922

No. 487

EDWIN SCHWAB,
Plaintiff in Error,

vs.

FRIEND W. RICHARDSON, as Treasurer of the State of California,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Preliminary.

Preparation and filing of brief in behalf of the defendant in error has been delayed in the expectation that a brief would first be submitted upon this appeal by the plaintiff in error. No brief has yet been filed by plaintiff in error and because of our inability to present oral argument we submit this

memorandum in support of the decisions of the State Courts in this cause.

Statement of the Case.

The facts are:

That Oceanic Steamship Company is a California corporation engaged in the business of transporting freight and passengers between the City of San Francisco and the Hawaiian Islands and certain foreign countries; that it maintains offices in said city for the transaction of said business and that it purchases a material part of its fuel and ship supplies in the State of California;

That such was the situation during the year 1913 and on the first Monday in March, 1914, at which time the State Board of Equalization of the State of California, acting pursuant to subdivision d, section 14, Article XIII of the Constitution of California, and pursuant to the enabling statutory legislation, Chapter 335, Statutes of California for 1911, as amended by Chapters 6 and 320, Statutes of California for 1913, ascertained the actual cash value of the corporate excess of said company within California and thereupon levied a tax for state purposes at the rate of one per cent of that value;

That in making said valuation the State Board first ascertained the value of all of the stock of said company, that from said value it deducted the ascer-

tained value of all of the tangible property of said company situated within and outside of the State of California, that the Board then ascertained the percentage of the total business of said company carried on within the State of California during the year 1913 and concluded that that percentage of the total franchise value of said company constituted the value of the company's franchise or corporate excess taxable within the State of California, and thereupon took fifteen per cent of the sum then ascertained which it held to be the value of the franchise taxable within the State of California;

That upon taking fifteen per cent of the full value of the California franchise there was produced the sum of $120,000, which the Board determined to be the actual cash value of the corporate excess of said company and upon which it levied a tax at the rate of one per cent, producing the sum of $1200, which is the amount of the disputed tax;

That the market value of the shares of stock of said company was materially increased by reason of, and in great part due, to the ownership and use by said company of property outside the State of California.

The foregoing facts are set forth in the company's amended complaint which appears in the transcript of record, pages 1 to 12 inclusive.

The State Supreme Court assumed that the percentage of the total business of the company for the

year 1913 done in California was fifteen per cent and interpreted the record as showing that the State Board adopted as the value of the corporate excess taxable in California fifteen per cent of the total franchise value of the company, which was ascertained by deducting the value of all tangible property from the value of all of the company's stock. It has always been the understanding of the defendant in error, and according to the company's briefs in the State courts its understanding also, that after the ratio of the California business for 1913 to the entire company business for that year was ascertained and applied to the entire franchise value of the company, the State Board then took but fifteen per cent of the amount thus computed and treated that as the valuation which would be placed upon the California franchise.

The answer to the company's complaint denied that the assessment and levy operated to tax any property having its situs outside of the State of California, and denied that the value of the franchise in question was $500, as alleged by the company, the answer alleging a valuation of $120,000. Judgment on the pleadings was rendered against the company on motion of defendant and the judgment was affirmed by the District Court of Appeal of California for the First Appellate District. The Appellate Court decision is reported in Volume 32, Cal. App. Dec. 171. A hearing was granted by the

State Supreme Court, which also affirmed the judgment of the trial court, its decision being reported in 204 Pac. 396, and also being set forth in the transcript of record before this Court.

Argument.

We have but little to call to the attention of the Court because we deem the State Supreme Court's opinion in the matter, issued as recently as January 30, 1922, a conclusive answer to any attack that can be made by plaintiff in error upon points which this Court will consider.

That the so-called State "franchise" tax in California is in reality a tax upon "corporate excess" has been definitely established by the Supreme Court of California in the cases of

Miller & Lux, Inc. v. Richardson, 182 Cal. 115;

People v. Ford Motor Co., (Cal.) 204 Pac. 217;

Utah Construction Co. v. Richardson, (Cal.) 203 Pac. 401.

In the State courts it was urged by the plaintiff in error that the method pursued by the State Board was illegal because of the failure to make a deduction for the element of good will, but this point was finally disposed of, in favor of the State Board, in the case of Miller & Lux v. Richardson, supra.

What developed to be the only remaining contention against the validity of the tax in the State Supreme Court, and therefore the only contention which this Court will consider, inasmuch as we are now before a Court of review, is that the method followed by the State taxing body operated to impose a tax burden upon property having its legal situs outside of California and was an interference with the interstate commerce in which said company was engaged.

It has been said that the State Supreme Court should here have followed its decision in the case of

People v. Alaska, etc. Co., 182 Cal. 207,

but in that case the company was not a California corporation, did not have the right to be a corporation from a charter granted by the State of California, and was doing absolutely no business of intrastate character in California. Here the company, by grant of the State of California, had the right to be a corporation in California, was in fact enjoying and exercising that right, and was doing intrastate as well as interstate business.

In its opinion our State Court has referred to various familiar cases holding that because a tax incidentally affects interstate commerce, it is not thereby obnoxious to the commerce clause. The test is whether the particular method of State taxation constitutes an honest attempt to reach only

that corporate property which is within the bounds of the taxing State. To the authorities cited by the State Court in this connection may be added the recent cases of

Southern Ry. Co. v. Watts, No. 7 U. S. Supreme Ct. Adv. Opinions, p. 199 (Feb. 1, 1923);

St. Louis, etc. Ry. Co. v. State of Missouri, No. 14 U. S. Supreme Ct. Adv. Opinions, p. 552 (June 1, 1921);

St. Louis-San Francisco Ry. Co. v. Middlekamp, No. 14 U. S. Supreme Ct. Adv. Opinions, p. 576 (June 1, 1921);

Hump Hairpin Mfg. Co. v. Emmerson, No. 12 U. S. Supreme Ct. Adv. Opinions, p. 343 (May 1, 1922);

Atlantic Coast Line R. R. Co. v. Daughton, Nos. 724, 727, 744, 756 U. S. Supreme Ct. Opinions, issued June 4, 1923;

Pullman Co. v. Richardson, Adv. O. 67 L. E. 397, 43 S. C. 366;

Judson, etc. Co. v. Commonwealth, 136 N. E. 375.

Many authorities are cited in the opinions of the two State Courts in this cause in justification of an apportionment or allocation of entire franchise or corporate excess value on the basis of income, in the process of determining what part of the franchise or

corporate excess may be fairly attributed to a taxing State. To that list of citations may be added

People v. Ford Motor Co., supra;

Horn Silver Mining Co. v. New York, 143 U. S. 305;

Mexican Petroleum Corp. v. Bliss, 110 Atl. 867.

The fairness and reasonableness of determining the value of railroad property situated within a taxing state according to the so-called gross receipts ratio is established by a wealth of decisions of this Court, including the more recent decisions hereinabove cited.

The case of

Looney v. Crane, 245 U. S. 178,

has always been the main reliance in the attack made by plaintiff in error. We have never questioned the conclusions therein reached or argued to the contrary. Our position has always been and still is that the Looney case is distinguishable, and offers no support to the complaining taxpayer because the tax there involved was a fixed percentage of all of the corporation's capital and surplus representing its property wherever situated and all of its business, both interstate and intrastate. Here neither the total business nor the corporate total capital was taxed as such. The total business of the company was, of course, taken into consideration, but merely as a measure by which to determine the value of the

company's corporate excess situated, in a legal sense, within the State of California. The distinction in the Looney case is strongly and clearly stated in the opinion of the State District Court of Appeal in this cause.

Wherefore we respectfully submit that the judgment of the State Supreme Court in this cause should be affirmed.

Dated, San Francisco,
October 6, 1923.

U. S. WEBB,
Attorney General of the State of California,
FRANK L. GUERENA,
Deputy Attorney General of the State of California,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 81.

EDWIN SCHWAB, PLAINTIFF IN ERROR,

vs.

FRIEND W. RICHARDSON, AS TREASURER OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF PLAINTIFF IN ERROR.

W. I. BROBECK,
HERBERT W. CLARK,
Attorneys for Plaintiff in Error.

(29,037)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 81.

EDWIN SCHWAB, PLAINTIFF IN ERROR,

vs.

FRIEND W. RICHARDSON, AS TREASURER OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF PLAINTIFF IN ERROR.

Statement.

This is an action by Edwin Schwab, assignee of the Oceanic Steamship Company, to recover taxes paid under protest by the Oceanic Steamship Company to the State of California. The trial court decided that the plaintiff is not entitled to recover; and the Supreme Court of the State of California affirmed that decision (63 Cal. Dec., 127; 204 Pac., 396)

The case is now before this court on writ of error under section 237 of the Judicial Code.

> "The Oceanic Steamship Company is a Corporation organized under the laws of the State of California and engaged exclusively in the business of transporting freight and passengers between San Francisco and the Hawaiian Islands and certain foreign countries. The company has maintained offices in San Francisco for the transaction of its interstate and foreign business, but has conducted no other business in this State (California) except the purchase of its fuel and supplies used in its transportation business" (R., fols. 37 and 3).

The Constitution of California (art. XIII, sec. 14 (*d*)) provides, in so far as its terms are material here, that "all franchises * * * shall be assessed at their actual cash value, in the manner to be provided by law, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the State."

The legislative act (Stats. 1911, sec. 6, p. 533) in force at the time of the imposition and payment of the tax now sought to be recovered provided, in so far as its terms are here pertinent, that, "all franchises * * * shall be assessed at their actual cash value * * * in the manner hereinafter provided, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the State. These franchises shall include the actual exercise of the right to be a corporation and to do business as a corporation under the laws of this State * * *."

The Legislature further provided (Stats. 1911, sec. 9, p. 541) that:

> "The owner or holder of every franchise, subject to taxation as provided in section five of this act, shall within ten days after the first Monday in March in each year, make a written report to the State board of equalization * * * containing such a concise statement or description of every franchise possessed or enjoyed on said day by such owner or holder * * * and containing also"

the information set out in plaintiff's complaint as shown in paragraph IV thereof (R., fols. 5-8). Continuing, the statute provides (Stats. 1911, p. 542) that

> "The State board of equalization shall ascertain and determine from the foregoing reports, or from the best information it can obtain, the actual cash value on the first Monday in March of each such franchise, and shall assess and levy the taxes thereon in accordance with the provisions of subdivision (*d*) of section fourteen of article thirteen of the Constitution of this State."

Section 23 of the same legislative act (Chap. 335, stat. 1911, p. 548) provides that:

> "Any company, person, or association dissatisfied with any assessment made by the State board of equalization may bring an action against the State treasurer for the recovery of any taxes, penalties or costs paid on such assessment, but no such action may be brought later than the third Monday in February next following the day on which the taxes were due, nor unless such company, person or association shall have filed

> with the State controller at the time of payment of such taxes a written protest stating whether the whole assessment is claimed to be void, or if a part only, what part, and the grounds upon which such claim is founded; and when so paid under protest, the payment shall in no case be regarded as voluntary. * * * The Attorney General must defend the action."

It was also provided by law (chap. 335, Stats. 1911, sec. 24, p. 548) that within ten days after the first Monday in February the Controller shall mail a notice to every company whose taxes are delinquent, stating the amount of the taxes, penalties and costs, and advising each such company that if such taxes, penalties and costs are not paid on or before the first Monday in March next thereafter at 6 o'clock p. m. "the delinquent company if it be a domestic corporation will forfeit its charter to the State, * * *." If the taxes are not paid the Controller is required to mark on the records "opposite the assessment of the delinquent company, the words 'charter forfeited to the State,' if the delinquent company be a domestic corporation, and thereupon said charter shall be so forfeited, * * *."

In determining the value of the franchise of the Oceanic Steamship Company and assessing the tax here challenged, the State board of equalization pursued, admittedly, the following course: It ascertained the actual or market value of the capital stock of the company as of the first Monday in March, 1914, which value included the value of all the property of the company within and without the State of California. From the market value of the capital stock there was then deducted the value of all the tangible property of the company within and without the State of California. The

remainder was held by the board to constitute the total value of the franchise of the company. Next, the board ascertained what proportion of the company's total business was transacted within California during the year 1913, and concluded that the same proportion of the total franchise value constituted the value of the franchise taxable by the State. Then the board took 15 per cent of the value thus ascertained, which 15 per cent amounted to $120,000.00, and valued at $120,000.00 the franchise to be a corporation and to do business as such under the laws of California, and levied the one per cent tax against that valuation (R., fols. 9-11).

Admittedly, also, since more than a year prior to March, 1914, a large part of the property belonging to the company had been, and on the first Monday in March, 1914, was, situated and used without the State of California (R., fol. 9).

The plaintiff charged that the assessment above described was made "in pursuance of a fixed rule and general system, the result of which was necessarily discriminatory and inequitable;" that the assessment and levy are void as an attempt to deprive the company of its property without due process, and, also, because they constitute an attempt to regulate interstate and foreign commerce, and deny to the company the equal protection of the laws (R., fols. 8-9).

The defendant, Richardson, as State Treasurer, denied that the State board of equalization pursued a fixed rule or general system in assessing the company's franchise; denied that the method pursued produced a result which was discriminatory or inequitable, and denied that the assessment and levy were void for any reason. The defendant also denied that the actual value of the franchise of the Steamship Company was $500 and alleged that it was actually $120,000 (R., fols. 27-28).

Issue being thus joined, the plaintiff moved for judgment on the pleadings, which motion was denied, and judgment was entered for defendant (R., fol. 32). On appeal, the Supreme Court of California affirmed the judgment of the trial court.

Assignment of Errors.

1. The court erred in holding that the assessment and levy complained of did not constitute an attempt to deprive the Oceanic Steamship Company of property without due process of law;

2. The court erred in holding that the assessment and levy complained of were not an attempt to regulate interstate and foreign commerce;

3. The court erred in holding that the assessment and levy complained of did not burden interstate commerce.

ARGUMENT.

I.

The imposition here challenged is a burden on interstate and foreign commerce and a deprivation of property without due process because it is based on the value of property outside of California and on interstate and foreign commerce engaged in, so that the amount of it grows in proportion to the growth of such property and commerce.

At the threshold of the argument, attention may well be called to a misconception in the opinion of the Supreme Court of the State of California. It is there stated (R., fol.

38), that, "It is contended by appellant that as the State has imposed a property tax upon the tangible property of the corporation within the State, this tax upon the tangible property of the corporation is in effect a tax upon interstate commerce, and therefore violative of the interstate commerce clause of the Constitution of the United States."

Such a contention, without more, would be a plain admission of the validity of the tax here challenged. The statement of the Supreme Court of the State, we submit with deference to that court, is based upon a complete misapprehension of the position of this plaintiff in error. We contended in the trial court and in the Supreme Court of the State, and we contend here, that the imposition here involved is a burden on interstate and foreign commerce because it is based, in whole or in substantial part, on the value of property outside of California, or on interstate or foreign commerce engaged in, so that the amount of it grows in proportion to the growth of such property or commerce. This, obviously, is a different contention from the one with which we are charged by the Supreme Court of the State.

Plaintiff in error does not contend that the constitutional provisions or the statutes under which the franchise tax here involved was levied are on their face obnoxious to the commerce or due process clause of the Federal Constitution. Clearly, the State of California has power to impose a tax upon the franchise of a corporation of its own creation. But plaintiff in error does contend that the necessary operation and effect of the method or plan admittedly pursued by the State board of equalization in this particular case render the assessment and tax void as burdensome to interstate and foreign commerce and as constituting an unlawful depriva-

tion of property. Although possessed of the power to tax the franchise of the Oceanic Steamship Company, the question here is: Has the State validly exercised that power in this particular case? "The substance and not the shadow determines the validity of the exercise of the power" (*Postal Telegraph Cable Co. v. Adams*, 155 U. S., 688, 698; *Kansas City Ry. v. Kansas*, 240 U. S., 227, 231). The California franchise tax is a property tax (*Bank of California v. San Francisco*, 142 Cal., 276).

As already stated, the Oceanic Steamship Company is and at all times has been engaged *exclusively* in the business of transporting freight and passengers in interstate and foreign commerce. It conducts no other business in California except the purchase of a portion of its fuel and supplies used in its interstate and foreign transportation business (R., fols. 3 and 37). Pursuing the method used by the State board of equalization in arriving at the value of the company's franchise and viewing the operation and effect of that method as enforced (*Kansas City Ry. v. Kansas, supra*), it would appear that as the volume and value of interstate and foreign business transacted by the Oceanic Steamship Company increased or diminished so also would the franchise value increase or diminish; and that, therefore, the tax resulting from the use of that method has a direct relation to interstate and foreign commerce—such a direct relation "as to be an exercise of power prohibited by the commerce clause" (*Kansas City Ry. v. Kansas, supra*). For, as stated in *Crane Co. v. Looney*, 218 Fed., 260, at pages 263-4 (affirmed 245 U. S., 178),

> "An imposition which is based, whether in whole or in substantial part, on the value of property outside of the State, or on interstate or foreign commerce en-

> gaged in, so that the amount of it grows in exact proportion to the growth of such property or commerce, is a burden on such property or commerce. This burden the State cannot impose, either directly or as a condition to the grant of a privilege which it may confer or withhold."

Here, as in the Looney case, it should be noted, the exaction is so made that the amount of it "cannot be determined without taking into account the amount of property and business which are not subject to State taxation," and is "greater or less according as such property or business is greater or less."

The State court relies upon *Cream of Wheat Company v. County of Grand Forks,* 253 U. S., 325. But in that case there was not presented any question as to the effect of the tax under the commerce clause, while in the case at bar the effect of the tax under the commerce clause is directly presented.

The State court also relies upon *Underwood Typewriter Co. v. Chamberlain,* 254 U. S., 113. In that case, however, it is expressly stated (p. 119) that payment of the tax "is not made a condition precedent to the right of the corporation to carry on business, including interstate business." In the case at bar, however, failure to pay the tax here imposed would have been visited with forfeiture of the Oceanic Steamship Company's charter. Moreover, the Underwood Typewriter Company was engaged in both interstate and intrastate business. The Oceanic Steamship Company was engaged in interstate and foreign commerce exclusively.

Lastly, the case of *Kansas City Ry. v. Kansas,* 240 U. S., 227, is cited by the State court. But in that case a maximum fee was fixed by law while here no limit is placed in any way.

Conclusion.

Thus, upon an examination of the facts of the particular case at bar, it is submitted that the necessary operation and effect of the imposition require the conclusion that it is a "prohibited exaction" (*Baltic Mining Co. v. Massachusetts,* 231 U. S., 68; *Kansas City Ry. v. Kansas,* 240 U. S., 227, 233).

Respectfully submitted,

W. I. BROBECK,
HERBERT W. CLARK,
Attorneys for Plaintiff in Error.

OCTOBER, 1923.

Judgment affirmed.

SCHWAB *v.* RICHARDSON, AS TREASURER OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 81. Submitted October 15, 1923.—Decided November 12, 1923.

1. A State may tax the franchise of a corporation of its own creation upon a valuation arrived at by deducting from the actual or market value of its capital stock the value of its tangible property within and without the State, by assigning, as the assessable and taxable value within the State, such part of this difference as is proportional to the business of the corporation transacted there, compared with its outside business, and by levying the tax upon a percentage of this taxable value. P. 91.

2. A tax so assessed, not excessive in amount, on a corporation largely engaged in interstate and foreign commerce, *held*, not objectionable as depriving the corporation of property without due process of law or as regulating or burdening such commerce. *Id.*

188 Cal. 27, affirmed.

ERROR to a judgment of the Supreme Court of California which affirmed a judgment given on the pleadings against the plaintiff in error in his suit to recover a tax, paid under protest.

Mr. W. I. Brobeck and *Mr. Herbert W. Clark* for plaintiff in error.

Mr. U. S. Webb, Attorney General of the State of California, for defendant in error. *Mr. Frank L. Guerena*, Deputy Attorney General, was also on the brief.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The case presents the validity of state taxation on the franchise of the Oceanic Steamship Company, a corporation of the State of California.

There is no dispute of facts. The case turns entirely upon the law applicable to them. The Company was organized to engage under California laws in the transportation of freight and passengers between San Francisco and the Hawaiian Islands and certain foreign countries, and did no intrastate business except the purchase of its fuel and supplies used in its transportation business.

The Company made a written report to the State Board of Equalization as required by the law of the State. The report contained a concise statement and description of every franchise enjoyed by the Company, and other matters required of the Company by the law.

The Board, in pursuance of the law and the constitution of the State, determined the value of the franchise granted by the State to be $120,000 and assessed and levied a tax

thereon of one per cent. which amounted to the sum of $1,200. It is contended that the assessment and levy were and are void under § 1 of Amendment XIV of the Constitution of the United States, because thereby the Board assessed and taxed the Company on property the situs of which was, for more than a year prior to the assessment, and is, without the State of California and beyond the jurisdiction of the State for the purpose of taxation, and attempts to regulate and burden interstate and foreign commerce.

The specification of the means is expressed in the complaint, in addition to the situation of the Company's property, as follows: The Company engaged in business outside of the State. In assessing the franchise of the Company the Board of Equalization did so in pursuance of a fixed rule and general system which necessarily was discriminatory and inequitable. The Board ascertained the actual or market value of the capital stock of the Company, which was constituted of all the value of its property outside of the State, and from such sum deducted the value of the tangible property of the Company in and out of California, and the sum thus ascertained was held by the Board to be the value of the franchise of the Company. The Board then ascertained the percentage and proportion of the total business of the Company transacted in California during the year 1913, and determined the same percentage and proportion of the total franchise value to be the value of the franchise assessable and taxable in California, and the Board thereupon took 15% of that sum, which amounted to $120,000, and on that sum levied a tax at the rate of 1%, amounting to $1,200. And it is alleged that the market value of the shares of capital stock of the Company was at all times materially increased by reason of, and in a great part due to, the ownership and use by the Company of the property outside of the State.

The Company paid the tax under protest. It subsequently assigned its claim to Edwin Schwab, plaintiff in error, who brought this action in the Superior Court of San Francisco against the State, basing the ground of action upon the illegality of the tax.

The answer of the Treasurer to the complaint admitted the assessment of the franchise but denied that the method pursued by the Board of Equalization in the assessment produced a result which was unnecessarily or at all discriminatory, or necessarily or at all inequitable.

Denied that the assessment was or is void under any law or for any reason whatsoever, or that the Board assessed or taxed the Company on any property the situs of which was or is without the State or beyond the jurisdiction of the State for the purpose of assessment.

Alleged that the value of the franchise was the sum fixed by the Board.

Judgment was moved on the pleadings, and plaintiff in error elected to stand on the motion without introducing evidence. The motion was denied and judgment rendered against him. It was affirmed by the Supreme Court. 188 Cal. 27.

Three contentions are made against the assessment and levy. (1) They deprive the Company of its property without due process of law. (2) They are an attempt to regulate interstate and foreign commerce. (3) They are burdens upon interstate commerce.

The argument is that they have such effect because they are "based on the value of property outside of California and on interstate and foreign commerce engaged in, so that the amount of" them "grows in proportion to the growth of such property and commerce."

The basis of the contention is not a new one in this Court. It is not always easy to answer and has involved difference of opinion. Any property of a corporation engaged in interstate commerce may be said to take on

value from such commerce and a tax on the property be increased as the commerce increases. The cases, however, have been careful to distinguish when such effect produces illegality and when it does not.

They have been careful to declare the immunity of interstate commerce from state taxation, but as careful to declare the power of a State to tax values within its borders though they may get enhancement from the exercise of rights outside of those borders. How intimate and direct such rights must be cannot be pronounced in formula. A State may not burden or interfere with interstate commerce or tax property outside of its borders, yet, on the other hand, it has a definite sphere of government which must not be curtailed. Certainly it is not restricted to property taxation, nor to any particular form of excises.

The exertion of the power of a State in taxation has been considered in many cases. A review of them we do not think is necessary. Their pertinence and value are not insistent. The present case is more single. Its instance—the taxation exercised—is upon intangible property. The power of a State over that has been declared many times and has many illustrations. The case is, therefore, free from the perplexity of a consideration of situs which may beset tangible property. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194. It is strictly a franchise tax laid on the Company because it derives its existence—its right to be—from the State.

This is the field within which this case lies and we are not concerned with those which reach beyond that field. To this we confine ourselves. The State has taxed the right which it granted, and which it was competent to tax. *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305. *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688; *Kansas City, etc., Ry. Co.* v. *Botkin*, 240 U. S. 227; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325. And

it has been recognized that its—the franchise's—value may be constituted of its employment in interstate commerce, and have measurement in the property which is its instrumentality. *Kansas City, etc. Ry. Co.* v. *Botkin, supra; St. Louis-San Francisco Ry. Co.* v. *Middlekamp,* 256 U. S. 226.

Plaintiff in error resists these cases, yet concedes the power of the State to tax the franchise—a "right of its own creation," and concedes that neither the constitutional provisions nor the statute under which the tax was levied "are on their face obnoxious to the commerce or due process clause of the Federal Constitution." That effect is worked, it is the contention, emphasized by repetition, because the tax is based in whole or in substantial part on the value of the property outside of California, or on interstate or foreign commerce engaged in, so that the amount of it grows in proportion to the growth of such property or commerce.

The contention and its basis are in antagonism to the cases cited and their authority. A repetition of their reasoning is unnecessary. They establish that the method pursued by the Board was not illegally oppressive to interstate commerce or beyond the jurisdictional power of the State. We agree with the Supreme Court that it was admitted by the motion for judgment on the pleadings, without introducing evidence, that the tax was not excessive and that if the State had jurisdiction the imposition of the tax was a proper exercise of it.

Judgment affirmed.